

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **UNITED STATES OF AMERICA,**

4 **Plaintiff,**

5 **v.**

6 **COMMONWEALTH OF PUERTO**
7 **RICO, et al.,**

8 **Defendants.**

CASE NO. 99-1435 (GAG)

9 **OPINION AND ORDER**

10 Over two decades ago the Commonwealth of Puerto Rico and the United States Department
11 of Justice voluntarily entered into a consent decree in this case. The same was intended to
12 constitutionally safeguard the rights of hundreds of persons with mental disability under the
13 Commonwealth's *parens patriae*. Throughout the ensuing years the parties have amended and
14 expanded the agreement. The Court has approved the same and via multiple orders carefully
15 delineated its parameters.

16 The consent decree, in turn, calls for the appointment of a federal monitor appointed by the
17 Court. Over time, complexities in compliance and providing adequate services to the hundreds of
18 participants with mental impairments led the Court to gradually expand the monitor's office both as
19 to its staff and budget. Today, the office has deputy monitors, legal counsel, mental experts, support
20 staff, as well as multiple consultants. In addition, following a contempt finding late last year, the
21 Court appointed an independent federal auditor to oversee the Commonwealth's management of
22 funds annually earmarked for its Health Department Individuals with Disabilities Division.

23 One would logically surmise that the principal focus of the consent decree is the rendering
24 of desperately needed services and programs to the participant beneficiaries. For example, former

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1 Health Secretary Dr. Rosa Pérez Perdomo repeatedly accompanied the undersigned and the monitor
2 in visits to homes and centers. In his previous tenure as Health Secretary Dr. Lorenzo González was
3 greatly responsible for promoting and modernizing the transformation of the original agreement into
4 the present JCAP. More recently, former Health Secretary Dr. Ana Rius agreed to the expansion of
5 the number of participants so as to include all persons within the Health Department's tutelage.

6 To the Court's chagrin, however, such portentous actions are overshadowed by other
7 inconspicuous yet highly detrimental repeated ones. Historically, the Commonwealth, time and time
8 again, has focused its resources to question, challenge and even attack the monitor and his office.
9 There have been four monitors in this case. The first, the late Dr. John McGee. With regards to him
10 the Commonwealth repeatedly questioned his authority to monitor, visit homes and conduct
11 interviews of providers and health department officials without prior notification. Dr. McGee was
12 followed by Dr. Sylvia Fernández. Once again, the Commonwealth incessantly questioned her
13 authority to do exactly what her predecessor did. More so, there came a point in which the
14 Commonwealth insisted that all her requests for documents had to be reviewed and approved by its
15 counsel. The Commonwealth even intended that she enter into a professional services contract with
16 it. To add gasoline to the fire, the Commonwealth filed a motion under Fed. R. Civ. P. 11 against
17 Dr. Fernández when in an official report to the Court she quoted health official and provider
18 statements to the effect they were being pressured not to provide information. Dr. Javier Aceves,
19 next in succession, fared no better. Once again, his authority to conduct unannounced visits, as well
20 as to interview health department officials and providers was consistently questioned. Readily
21 obtaining documents and information again became a constant nightmare.

22 Every time during the aforementioned instances—and there are many others that have been
23 left out for expediency's sake—the Court and United States Department of Justice have had to step
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1 up to protect the integrity of the federal monitoring process. The particular matter during each
2 occasion was seemingly resolved by the Court, only to resurface like the classic Universal movie
3 monsters that cannot be destroyed. Looking back on a large scale, this has been an unconscionably
4 enormous waste of federal judicial and executive time over the years—hundreds, more likely
5 thousands, of hours and dollars—which also the Commonwealth could have devoted to assisting the
6 participants.

7 Over the last several months again, and to the Court's extreme disappointment, this cyclical
8 pattern and practice of the Commonwealth has resurfaced. The fourth monitor, Attorney Alfredo
9 Castellanos Bayouth, has fared no better than his predecessors. Since 2014 he has participated in
10 this case first as legal counsel, next as lead deputy monitor and special master, and, finally, acting
11 monitor. The Court appointed him monitor just last December when Dr. Aceves formally stepped
12 down for personal reasons not relevant to the case. Since the beginning of this year as to which only
13 four months have transpired, the Monitor Office's work has been constantly placed in check by the
14 Commonwealth. The authority to access documents from, as well as interview health department
15 officials and providers has been repeatedly hampered and questioned. Surprise inspections and visits
16 have been frowned upon. The role and authority of the Monitor has again been challenged
17 repeatedly. Finally, the integrity and transparency of the Monitor Office staff has been called into
18 question.

19 During the February 2020 status conference, US Department of Justice Senior Trial Attorney
20 Richard J. Farano quite ably denounced the Commonwealth's *modus operandi*, highlighting the
21 many instances the Monitor's work was in the past highjacked and the ensuing actions taken by the
22 Court. The undersigned fully concurs with counsel Farano's precise and detailed assessment
23 reflected in the conference transcript which in due course will be made part of the record.

1 The docket of this case since January is be riddled by countless entries of court orders and
2 motions of the parties and monitor, again addressing the monitor's function and work. *See, e.g.,*
3 Docket Nos. 2684, 2686, 2690, 2709, 2710, 2721, 2722, 2738, 2741, 2744, 2745, 2748, 2749, 2750,
4 2751, 2752, 2753, 2754, 2760, 2762, 2764, 2771, 2774, 2778, 2780, 2784, 2785, 2787, 2792, 2794,
5 2798, 2800, 2805, 2807, 2810, 2812, 2821, 2825, 2826, 2827, 2836 & 2839. The Court will not
6 engage in another wasteful exercise of going over one by one. Its rulings are clear to all and are final
7 on the matter. Any future attempt by the Commonwealth to re-litigate the same will be considered
8 vexatious and sanctionable conduct.

9 The Court will now address the latest Commonwealth's latest filing at Docket No. 2836 and
10 the United States Department of Justice's response at Docket No. 2839. In a nutshell, the
11 Commonwealth objects to the Monitor Office's April 2020 invoice, contending that the same lacks
12 transparency, as well as evidence to support the work performed by the Monitor and his staff, as
13 well as by his consultants. In addition, the Commonwealth claims that the Monitor Office has over
14 billed for its services. The Department of Justice vehemently disagrees, responds with the exact
15 opposite conclusions and asks that the Monitor Office invoice indeed be approved by the Court. The
16 Court wholeheartedly concurs with the Department of Justice, adopts its entire reasoning, and thus
17 approves the monitor's April 2020 invoice.

18 Certain Department of Justice observations deserve to be highlighted one final time. First,
19 the monitor, his staff and consultants are not Commonwealth employees nor contractors. They are
20 fully deputized federal judicial officers bound by the Code of Judicial Conduct. Those who are
21 licensed attorneys before this Court, just as counsel for the parties, are also bound by the Model
22 Rules of Professional Conduct. As such, they are bound by federal court rather than Commonwealth
23 fiduciary principles and guidelines. Second, the funds deposited annually in the Court Registry to
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1 operate the Monitor Office, are disbursed on a periodic basis by the Court, after it is satisfied that
2 the invoices properly reflect the work performed. This review and audit process is analogous to the
3 Court's frequent review of invoices submitted by counsel appointed under the Criminal Justice Act.
4 Third the funds in the Court Registry are deposited by virtue of the consent decree and ensuing court
5 orders so as to guarantee an entirely independent federal monitor. This is an arrangement which the
6 Commonwealth since the outset agreed. Fourth, the month of April of 2020 was characterized by
7 intense Covid-19 pandemic extraordinary work by all, the Court included. It should thus come as no
8 surprise that the Monitor Office indeed worked beyond the expected normal in order to assure the
9 Court that the participants were guaranteed the best medical alternatives. Fifth, the Monitor alone is
10 assigned the task of effectively managing his staff. Over time he may also cross train staff to perform
11 multiple functions. Finally, the monthly work performed by the Monitor is typical of his counterparts
12 across the Nation in other mental disability consent decree cases, as acknowledged by the
13 Department of Justice. In this case, said work has been expounded because of the Commonwealth's
14 constant challenges, outlined previously. More so, the Court notes that in this case the Monitor as
15 well as his staff and consultants are greatly under-compensated for their intense and draining work,
16 whose only goal is to ensure the Commonwealth's compliance with constitutional mandates, thus
17 safeguarding the sacrosanct lives, health and quality of life of every single participant. A monitoring
18 team composed of experts and counsel from the mainland, plus associated travel and other costs
19 would require a budget at a minimum five times that of the current monitor office. In this respect,
20 the Court has been extremely sensitive to the Commonwealth's precarious fiscal condition over the
21 last decade, even when increases to the Monitor Office budget are warranted. In light of the
22 preceding, the Court will not review past paid invoices, nor the Monitor's flat fee. Likewise, it will
23 not address herein work by monitor staff in other unrelated cases.

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1 To conclude, amongst my fellow Article III colleagues, it is extremely rare and extraordinary
2 to see challenges to a federal monitor's invoices. More so, like that now presented here. Attacking a
3 federal monitor's integrity and work is disruptive and distractive, more so given that a consent decree
4 case is not a litigious proceeding between the state and monitor. This adds unnecessary and
5 significant costs to the work of counsel and monitor, as well as requires the Court and Department
6 of Justice to devote precious time and effort to unduly address the matter.

7 A protracted war against any Office of the Monitor cannot serve as a means to an end of
8 preventing or obstructing a monitor from effectively monitoring. This would tantamount to an attack
9 against the judicial function itself.

SO ORDERED.

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11 In San Juan, Puerto Rico this 7th day of May 2020.

12 *s/ Gustavo A. Gelpí*
13 GUSTAVO A. GELPI
14 United States District Judge
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